

CHAPTER 2

EQUAL EMPLOYMENT OPPORTUNITY COUNSELING

I. INTRODUCTION

Equal Employment Opportunity counseling, or pre-complaint processing, is conducted pursuant to 29 C.F.R. section 1614.105, which provides that aggrieved persons who believe they have been discriminated against on the bases of race, color, religion, sex, national origin, age, or handicap, or in retaliation for having participated in activity protected under various civil rights statutes, must consult an EEO counselor prior to filing a complaint, in order to try to informally resolve the matter. Counseling is a required first step in the EEO complaint process. This section of the management directive prescribes Commission guidance and procedures to be followed by EEO counselors when presented with both individual and class allegations of discrimination.¹

While recognizing that each agency will have its own techniques for counseling, the Commission has compiled a guide of step-by-step techniques for counseling that may be used by agencies in developing or refining their own procedures. (See Attachment A.)

EEO counseling is an essential part of the Federal system for processing and resolving employee and applicant EEO concerns. The opportunity for informal resolution at an early stage is an important feature of the counseling stage. If resolution is not achieved, the counselor plays a vital role in ensuring prompt and efficient processing of the formal complaint.

The EEO counselor has six clearly defined duties that must be performed for each completed counseling action where an informal resolution is not achieved. The six duties are:

1. Advise the aggrieved person about the EEO complaint process under 29 C.F.R. Part 1614 and possible election requirements;

¹ All time frames set out in this Directive are stated in calendar days unless otherwise indicated.

2. Determine the issue(s) and basis(es) of the potential complaint;
3. Conduct a limited inquiry for the purposes of furnishing information for settlement efforts and determining jurisdictional questions if a formal complaint is filed;
4. Seek a resolution of the matter at the lowest possible level;
5. Document the resolution or advise the complainant of his/her right to file a formal discrimination complaint if resolution fails; and
6. Prepare a report sufficient to determine that required counseling actions have been taken and resolve any jurisdictional questions that may arise.

II. PROVIDING ADVICE TO THE AGGRIEVED PERSON

A. Provide Required Written Notice.

1. At the initial counseling session or as soon as possible after, the counselor must provide the aggrieved person written notice of the following:
 - a. The right to have the counselor refrain from revealing the identity of the aggrieved person except when authorized by the aggrieved person.
 - b. The right to representation throughout the complaint process including the counseling stage.
 - c. The possible election requirement between a negotiated grievance procedure and the EEO complaint procedure. Where an agency is covered by 5 U.S.C. § 7121(d)

and where the negotiated procedure and the statute² cover the alleged discrimination, the aggrieved individual is required to elect either: (1) the statutory procedure for discrimination (the internal agency EEO process) or (2) the negotiated grievance procedure, but not both.

- d. The election requirement in the event that the matter at issue is appealable to the Merit Systems Protection Board (MSPB), i.e., the matter is a mixed case.

The complainant has **20 calendar days** from the date of the alleged discriminatory act to file a mixed case appeal with the Merit Systems Protection Board and **15 calendar days** from the date of a counselor's notice of final interview or **30 calendar days** after the initial EEO counselor contact to file a formal mixed case EEO complaint. (S)he may not file both an MSPB appeal and an EEO complaint on the same matter. The process selected first is deemed the elected process.

- e. The requirement that the aggrieved person file a complaint within **15 calendar days** of receipt of the counselor's notice of right to file a formal complaint in the event (s)he wishes to file a formal complaint at the conclusion of counseling.
- f. The right to file a notice of intent to sue when age is alleged as a basis for discrimination and of the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to section 1614.201(a).

² The following civil rights statutes, collectively, protect on the bases of race, color, religion, sex, national origin, handicap, age, and reprisal: section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Title VII); sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a (Rehabilitation Act); section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a (ADEA), and The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (EPA).

- g. The right to go directly to U.S. district court on claims of sex based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.³
- h. The right to request a hearing before an EEOC administrative judge (AJ) in a non-mixed case after **180 calendar days** from the filing of a formal complaint or after completion of the investigation, whichever comes first.
- i. The right to go to U.S. district court **180 calendar days** after filing a formal complaint or 180 days after filing an appeal.
- j. The duty to mitigate damages, e.g., that interim earnings or amounts which could be earned by the individual with reasonable diligence generally must be deducted from an award of back pay.
- k. The duty to keep the agency and EEOC informed of current mailing address and to serve copies of appeal papers on the agency.
- l. The right to receive in writing within **30 calendar days** of the first counseling contact (unless the complainant agrees in writing to an extension) a notice terminating counseling and informing the aggrieved of: (1) the right to file a formal individual or class complaint within 15 calendar days of receipt of the notice, (2) the appropriate official with whom to file a formal complaint, and (3) the complainant's duty to immediately inform the agency if the complainant retains counsel or a representative. Any extension of the counseling period may not exceed an additional 60 calendar days. **Where notice is not provided and no extension is secured, the complainant has the right to file a formal complaint**

³ Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. Equal Pay Act complaints may be processed administratively under Part 1614. In the alternative, a complainant in the EPA matter may go directly to U.S. District Court.

after the 30th day. Exception: Where complainant agrees to participate in an established alternative dispute resolution program, the written notice terminating the counseling period will be issued upon completion of the dispute resolution process or within 90 calendar days of the first contact, whichever is earlier.

- m. Only the same or like and related matters raised at the counseling stage may be the subject of a formal complaint.
 - n. The time frames in the complaint process.
 - o. The class complaint procedures and the responsibilities of a class agent, if the aggrieved person informs the EEO counselor that (s)he wishes to file a class complaint.
- 2. The counselor must conduct a final interview with the aggrieved person within 30 days of initial contact unless the aggrieved person and the agency through the EEO Director or his/her designee agree in writing to an extension of counseling for up to an additional 60 days. Where the agency or the unit of the agency where the counseling occurs has an established alternative dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall not exceed 90 days.
 - 3. The counselor must provide the aggrieved person with a written notice of final interview at the conclusion of counseling. The notice will provide instructions on how to file a formal complaint (including a class complaint) and specify that such a complaint must be filed within fifteen (15) calendar days of receipt of a notice of final interview.
 - 4. If counseling continues beyond thirty (30) days, the counselor must inform the complainant that (s)he has the right to file a formal complaint after thirty (30) days in counseling, regardless of whether counseling has been completed.

B. Provide Other EEO Complaint Information to the Aggrieved Person.

In addition to providing a written notice as outlined above, the counselor should explain the requirements for initiating a formal complaint. If the complainant raises class issues, the counselor should explain the class procedures or refer the person to a counselor trained in class procedures.

1. Aggrieved Person Must Contact EEO counselor.

All persons who believe they have been discriminated against because of race, color, religion, sex, national origin, age, handicap or reprisal for opposing any practice made unlawful by Title VII, the ADEA, the EPA, or the Rehabilitation Act or for participating in any stage of administrative or judicial proceedings under those statutes, must first make contact with an EEO counselor to receive counseling before filing a formal complaint of discrimination. The counselor must make whatever inquiry into the matter (s)he believes necessary and seek resolution of the matter on an informal basis.

2. Time Limits.

A person who believes (s)he has been discriminated against is required to contact an EEO counselor **within 45 days** of the date the alleged discriminatory event occurred or the effective date of the alleged discriminatory personnel action. The agency shall extend the 45-day time limit to permit timely contact when:

- a. the aggrieved person shows that (s)he was not notified of the time limits and was not otherwise aware of them; or
- b. (s)he did not know and reasonably should not have known that the matter or personnel action occurred; or
- c. despite due diligence, (s)he was prevented by circumstances beyond his/her control from contacting a counselor within the time limits; or

- d. other reasons considered sufficient by the agency or Commission as are found to exist. All time limits in part 1614 are subject to waiver, estoppel, and equitable tolling. Where these exceptions are invoked, agency legal counsel should be consulted for guidance.

3. Class Agent Must Contact EEO Counselor.

The regulatory requirements for class complaints at 29 C.F.R. § 1614.204 provide a different structure for class complaints than for individual complaints. For class complaints there is a three-stage process. The first stage is the establishment of a class complaint. At this stage, the class agent is required to seek counseling from an agency EEO counselor. The second stage is a determination on the merits of the class complaint. The third stage is the determination of the claims for relief of the individual class members.

A class is defined as a group of employees, former employees, or applicants who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or handicap.

The aggrieved person comes to the EEO counselor as a class agent representing the group. A class allegation must be brought to the attention of an EEO counselor by a class agent **within 45 days** of the date that the specific policy or practice adversely affected the class agent or, if a personnel action, within 45 days after its effective date. Extensions of time should be considered by the agency pursuant to the guidance in section II.B.2. above.

A person must seek class counseling just as (s)he would for individual complaints. However, the facts must be framed to meet the requirements of section 1614.204.

C. Provide Information On Special Procedures as Required.

Depending upon the facts and circumstances of the particular case, an aggrieved person may have options other than the part 1614 procedure available in pursuit of a discrimination claim. The individual, in some cases, may have to elect the process (s)he wishes to pursue. These so-called "special procedures" apply in age discrimination complaints, mixed case complaints, Equal Pay Act complaints and matters where a negotiated grievance procedure could apply.

It is crucial, therefore, that the EEO counselor be familiar with those special procedures and be able to identify such cases when the aggrieved person first seeks counseling. Unless the counselor is able to identify a special case and advise the aggrieved person fully on the procedures, the aggrieved person will not be able to make informed decisions concerning his/her case. Experience has shown that sometimes aggrieved persons are given incomplete or incorrect information concerning the applicable procedures. Since aggrieved persons rely on the knowledge and advice of counselors, counselors must know the procedures and must be able to counsel aggrieved persons accordingly.

1. Negotiated Grievance Procedures in Collective Bargaining Agreements.

a. Aggrieved Person Makes Election.

At the initial counseling session, the counselor must inform the aggrieved person of the possible applicability of the election of remedies provisions from the Civil Service Reform Act of 1978, 5 U.S.C. § 7121(d), concerning negotiated grievance procedures.

- (1) In order for an aggrieved person to be covered under 5 U.S.C. § 7121(d), both of the following conditions must be met:

⁴ See also Chapter 3, § III.A., p. 3-8 for additional guidance on the election process.

- (a) (S)he must be employed in a Federal agency subject to the provisions of 5 U.S.C. § 7121(d); and
 - (b) (S)he must be covered by a collective bargaining agreement at the agency where the grievance arises. The agreement must also permit allegations of discrimination to be raised in the negotiated grievance procedure.
- (2) If these conditions are met, then the counselor must inform the aggrieved person that 5 U.S.C. § 7121(d) applies. This means that the aggrieved person must be informed of the requirement that (s)he choose one, (not both) of the following:
 - (a) a right to have his/her allegations of discrimination addressed in the negotiated grievance procedure of the collective bargaining agreement with a caution that the opportunity to raise allegations of discrimination will be lost if not raised in the grievance process; or
 - (b) a right to have his/her allegations of discrimination addressed under 29 C.F.R. Part 1614.
- (3) An election to proceed under 29 C.F.R. Part 1614 is indicated only by the filing of a formal complaint, in writing. Use of the counseling process does not constitute an election to proceed under 29 C.F.R. Part 1614.
- (4) Allegations of discrimination that are raised by employees not covered by section 7121(d) are to be processed as EEO complaints under 29 C.F.R. Part 1614 regardless of whether they are also pursuing a grievance on the same matter (e.g. a five day

suspension from work) under a collective bargaining agreement not covered by section 7121(d).⁵

- (a) Under section 1614.301(c), the complaint **may** be held in abeyance while the grievance on the same matter is processed. The abeyance shall terminate without further notice upon the issuance of a final decision on the grievance. The complaint may be held in abeyance **only if** the aggrieved is provided written notice of the abeyance.

The notice of abeyance shall state that the abeyance is instituted pursuant to section 1614.301(c) and that time limits for processing the complaint contained in section 1614.106 and for appeal to the Commission contained in section 1614.402 will also be held in abeyance until fifteen (15) days following the issuance of the final decision on the grievance.

- (b) If the EEO complaint is held in abeyance, the time limits for processing are tolled until a final decision is rendered in the grievance process.

b. Election is Final.

Pursuant to section 1614.301, EEO counselors are required to inform an aggrieved person that once (s)he decides which forum she will use - the negotiated grievance procedure in a collective bargaining agreement covered by section 7121(d) or 29 C.F.R. Part 1614 - the aggrieved person is precluded from using the other forum to address the same matter. This preclusion holds regardless of whether discrimination is actually raised. For example, if an aggrieved person elects to

⁵ Employees of the U.S. Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority are not subject to 5 U.S.C. § 7121(d).

have a matter involving a claim of discrimination addressed under the terms of a collective bargaining agreement by filing a grievance, (s)he could not also file a formal complaint of discrimination under 29 C.F.R. Part 1614 on the same matter. This bar to a subsequent formal EEO complaint would hold true even if the grievance omitted the allegations of discrimination.

If an agency issues a decision rejecting the grievance either because the individual is not covered by the collective bargaining agreement, the collective bargaining agreement does not contain a provision that allows allegations of discrimination to be raised in the grievance process, or because the grievance was untimely filed, the agency shall include appeal rights to the EEOC. The case shall be processed as a complaint under part 1614. 29 C.F.R. § 1614.301(b).

c. Appeals.

The complainant has the right to appeal a final decision on his/her grievance to the Commission as provided in subpart D of 29 C.F.R. Part 1614.

2. Mixed Cases.

a. MSPB Mixed Case Complaints and Appeals.

In addition to negotiated grievance procedures, an aggrieved person may present an allegation that constitutes a mixed case. A mixed case is one which alleges discrimination in connection with a matter which is also appealable to the Merit Systems Protection Board (MSPB). Two criteria determine whether a case is a mixed case:

- (1) the employee has standing to file an appeal to the MSPB. The following employees generally have a right to appeal to the MSPB:⁶
 - (a) competitive service employees not serving a probationary period under an initial appointment;
 - (b) career appointees to the Senior Executive Service;
 - (c) non-competitive service preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and,
 - (d) non-preference eligible excepted service employees with two or more years of current continuous service; and
- (2) the matter which forms the basis of the discrimination complaint can be appealed to the MSPB. Most MSPB appealable matters fall into the following six categories:
 - (a) reduction in grade or removal for unacceptable performance;

⁶ The following employees generally **do not** have a right to appeal to the MSPB:

- Probationary employees (see 5 C.F.R. Section 315.806 for exceptions);
- Non-appropriated fund activity employees;
- Excepted service employees with less than two years current continuous service; and
- Employees serving under a temporary appointment limited to 1 year or less.

- (b) removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for such cause as will promote the efficiency of the service;
- (c) separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction-in-force;
- (d) reduction-in-force action affecting a career SES appointee;
- (e) reconsideration decision sustaining a negative determination of competence for General Schedule employees; and
- (f) disqualification of an employee or applicant because of a suitability determination.

b. Choosing a Forum.

If both criteria for a mixed case are met, the EEO counselor must notify an aggrieved person that (s)he must choose the forum in which (s)he wishes to proceed. Where a negotiated grievance can also be filed, the counselor must explain that the aggrieved person must choose to proceed in one of three forums: the MSPB appeal process, the internal EEO process, or the negotiated grievance process (see section C.1. above).

- (1) Federal agencies are initially responsible for identifying mixed cases and for advising aggrieved persons of their right to pursue the matter as a mixed case complaint or as a mixed case appeal. Federal agencies must identify mixed cases early in order to ensure that aggrieved persons are fully informed of their complaint processing options.

- (2) An aggrieved person may choose to raise allegations of discrimination in a mixed case either as an appeal to the MSPB ("mixed case appeal") or as a discrimination complaint with the agency under 29 C.F.R. Part 1614 ("mixed case complaint"), but not both. Whichever action the employee files first is considered an election to proceed in that forum.
- (3) An election to proceed under 29 C.F.R. Part 1614 is made when the aggrieved person files a formal complaint in writing. Use of the EEO counseling process is not an election to proceed under 29 C.F.R. Part 1614.
- (4) If an employee chooses to file an appeal with the MSPB on a mixed case, the agency must thereafter dismiss any subsequently filed complaint on the same matter, regardless of whether the allegations of discrimination are raised in the appeal to the MSPB. Upon dismissal, the agency must advise the employee to raise the allegations of discrimination in connection with his/her appeal to the MSPB.
- (5) Where the agency disputes MSPB jurisdiction, the agency shall notify the complainant that it is holding the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue. During this period, all time limitations for processing or filing will be tolled.

An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC.

If the MSPB administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint under 1614.107(d).

- (6) If the employee elects to file a mixed case complaint under 29 C.F.R. Part 1614, the agency must process the complaint in a manner substantially similar to any other discrimination complaint, except that the employee is not entitled to a hearing before an EEOC administrative judge. An aggrieved person's appeal rights will be to the MSPB, not the EEOC. Following a final decision from MSPB, an aggrieved person may petition EEOC to consider that decision as it pertains to the allegations of discrimination.

c. Constructive Discharge.

A discriminatory constructive discharge occurs when the employer discriminatorily creates working conditions which are so difficult, unpleasant, or intolerable that a reasonable person in the aggrieved person's position would feel compelled to resign. In other words, the aggrieved person is essentially forced to resign under circumstances where the resignation is tantamount to the employer's termination or discharge of the employee.

Similarly, in coerced or involuntary retirement cases, the aggrieved person alleges that (s)he was essentially forced to retire, for example, because of age, and the retirement decision was not voluntary. Discriminatory coercion or involuntary retirement allegations are, if supported, tantamount to the employer discharging the employee.

- (1) MSPB dismissal may "unmix" a case.

An employee with MSPB appeal rights who alleges that (s)he was constructively discharged or coerced into retirement because of discrimination should be advised to file a mixed case complaint or a mixed case appeal. Where the merits of the claim of discrimination cannot be reached for lack of jurisdiction, the case will be considered no longer mixed.

- (2) An unmixed appeal--referral to counseling.

If an aggrieved person files a mixed case appeal with MSPB and MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to section 1614.107. The complaint will be processed as a non-mixed case. *See* § 1614.302(b).

- (3) Complainant in an "unmixed" complaint entitled to reissuance of notice pursuant to section 1614.108(f)--no referral to counseling.

When a mixed case complaint is "unmixed" by a finding by the MSPB of no jurisdiction, the individual has a right to elect between a hearing before an EEOC administrative judge or an immediate final decision. *See* § 1614.302(b).

D. Age Discrimination in Employment Act Complaints.

When a person contacts an EEO counselor with a complaint of age discrimination, the EEO counselor must make the person aware of two important options:

1. The person may choose to file a formal complaint under 29 C.F.R. Part 1614; or
2. The person may bypass the administrative complaint process in part 1614 and file a civil action directly in an appropriate U.S. district court after first giving the EEOC not less than 30 days notice of intent to file such action. Such notice must be filed within 180 days

after the date of the alleged discrimination. The notice may be mailed with EEOC Headquarters at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 19848
Washington, D.C. 20036

hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
1801 L Street N.W.
Washington, D.C. 20507

or facsimile sent to:

(202) 663-7022

3. Since the statute of limitations in ADEA cases is not consistently applied by the courts, an aggrieved person wishing to bypass the administrative process should initiate the civil action as soon as possible after the expiration of the 30-day waiting period which follows the notice of intent to sue.

E. Statutes and Regulations.

Generally, aggrieved persons want to know how the complaint process works and counselors can expect to receive many questions from aggrieved persons in this regard. It is imperative, therefore, that EEO counselors, from the outset, have a good working knowledge of the complaint processing regulations in part 1614 and a familiarity with the anti-discrimination statutes. The important anti-discrimination laws and regulations are:

1. Title VII of the Civil Rights Act of 1964, as amended

Title VII prohibits discrimination based on race, color, religion, sex, or national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any unlawful employment practice under Title VII. (A person filing a complaint under Title VII is protected from an agency taking retaliatory actions because the employee alleged discrimination.)

2. Age Discrimination in Employment Act of 1967, as amended (ADEA)

The ADEA prohibits discrimination in employment on the basis of age (40 years or older). Unlike Title VII and the Rehabilitation Act, the ADEA allows persons claiming age discrimination to go directly to court without going through an agency's administrative complaint procedures. If, however, a complainant chooses to file an administrative complaint, (s)he must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies 180 days after filing a formal complaint or 180 days after filing an appeal with the Commission if the Commission has not issued a decision.

3. Rehabilitation Act of 1973, as amended.

The Rehabilitation Act prohibits discrimination on the basis of mental and physical handicaps. Under certain circumstances, it requires an agency to offer to reassign a handicapped employee to a vacant funded position as an obligation under the affirmative action requirement of the Act. It requires that agencies shall make reasonable accommodations to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program.

4. Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963)(EPA)

The EPA prohibits sex-based wage discrimination. It prohibits Federal agencies from paying employees of one sex lower wages than those of the opposite sex for performing substantially equal work. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions.⁷

5. 29 C.F.R. Part 1614

The regulations governing the processing of Federal sector discrimination complaints are contained in Title 29 of the Code of Federal Regulations (C.F.R.), Part 1614. The regulations set out the counselor's obligations enumerated in section II of this Chapter.

III. DETERMINE THE ISSUE(S) AND BASIS(ES) OF THE POTENTIAL COMPLAINT

A. Determining the Issue(s).

At the initial interview, the counselor must determine what action(s) the agency has taken or is taking that causes the aggrieved person to believe (s)he is the victim of discrimination. This first step is essential to proceeding with the inquiry and resolution attempt and, if resolution is not achieved, essential to a focused investigation and hearing. Before the counselor begins the inquiry, (s)he must be certain that the issue(s) are clearly defined and the aggrieved person agrees on what issues are to be the subject of the inquiry and subsequent attempts at resolution. The counselor must also determine based on his/her understanding of the issues whether special procedures apply. The agency will dismiss an issue that has not

⁷ Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. Equal Pay Act complaints are processed under Part 1614. In the alternative, an Equal Pay Act complainant may go directly to U.S. District Court on the EPA claim.

been discussed with the counselor and if it is not like or related to a matter discussed with the counselor. Like or related matters may be referred back to the counselor for counseling.

B. Determining the Basis(es).

In order to have a complaint accepted for investigation, the aggrieved person must believe (s)he has been discriminated against on the basis of race, color, sex, religion, national origin, age (over 40), handicap or in retaliation for having participated in activity protected by the various civil rights statutes. It is important to determine if the aggrieved person believes that his/her problem is the result of discrimination on one or more of the bases.

C. When the Basis(es) is not covered by the EEO Regulations.

If it is clear that the aggrieved person's problem does not involve a basis(es) covered by the regulations, the counselor should inform the aggrieved person and, if possible refer him/her to an appropriate source. If the aggrieved person insists that (s)he wants to file a discrimination complaint, the counselor should issue the appropriate notice advising that counseling did not result in resolution and of his/her right to file a formal complaint. Under no circumstance should the counselor attempt to dissuade a person from filing a complaint.

IV. CONDUCTING THE INQUIRY

After the counselor has determined the basis(es) and issues, (s)he should conduct a limited inquiry. The purpose of the inquiry is to obtain information for settlement efforts and determine jurisdictional questions if a formal complaint is filed.

While the scope of the inquiry will vary based on the complexity of the issues, the inquiry is limited and not intended to substitute for the fact finding required in the formal stage. The counselor must at all times control the inquiry. If the aggrieved person or agency personnel raise objections to the scope or nature of the inquiry, the counselor shall seek

guidance and assistance from the EEO Officer. If the counselor has problems with the inquiry, (s)he should immediately notify the EEO Officer.

Attachment A includes suggested methods for conducting the inquiry. This guidance may be used to supplement established procedures.

V. SEEKING RESOLUTION

In almost all instances, informal resolution, freely arrived at by all parties involved in the dispute, is the best outcome of a counseling action. In seeking resolution, the counselor must listen to and understand the viewpoint of both parties so that (s)he is able to assist the parties in achieving resolution. The counselor's role is to facilitate resolution, not develop or advocate specific terms of an agreement. The counselor must be careful not to inject his/her views on settlement negotiations.

Attachment A includes suggested methods for seeking resolution. This guidance may be used to supplement established agency procedures.

VI. DOCUMENT THE RESOLUTION OR ADVISE THE AGGRIEVED PERSON OF HIS/HER RIGHT TO FILE A FORMAL DISCRIMINATION COMPLAINT IF RESOLUTION FAILS

Section 1614.105 requires that the counselor must conduct a final interview with the aggrieved person **within 30 days** of the date the aggrieved person brought the matter to the counselor's attention, unless an **extension up to an additional 60 days** has been agreed to in writing by the aggrieved person and the EEO office, or the aggrieved person has agreed to participate in an established agency alternative dispute resolution procedure. 29 C.F.R. § 1614.105(d), (e), and (f).

A. Resolution of the Matter.

If during the course of the EEO counselor's inquiry, the agency and the aggrieved person agree to an informal resolution of the matter, the terms of the resolution should be reduced to writing and signed by both parties to help ensure that the agency and the aggrieved person have the same understanding of the terms of the resolution. It is recommended that the terms of the informal resolution be set out in a letter and transmitted to the

parties by the EEO counselor with the knowledge and guidance of the EEO Officer or Director. The letter should state clearly the terms of the informal resolution and should notify the aggrieved person of the procedures available under section 1614.504 in the event that the agency fails to comply with the terms of the resolution. Attachment C is a recommended format for the resolution agreement.

The EEO counselor shall transmit a signed and dated copy to the EEO Officer. The EEO Officer shall retain the copy for one year or until (s)he is certain that the agreement has been implemented.

B. Failure to Resolve the Matter.

The aggrieved person may not be satisfied with the agency's proposed resolution of the matter, or the agency officials may not agree to the aggrieved person's suggestions. If informal resolution is not possible, the counselor must hold a final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the counselor's attention. If it appears that informal resolution is possible, given more time, the aggrieved person may agree in writing with the agency to postpone the final interview and extend counseling for an additional period of time, not to exceed 60 days. If the matter is not resolved at the end of the extended time period, the counselor must advise the aggrieved party in writing of his/her right to file a complaint.

C. Duty to Advise.

During the final interview with the aggrieved person, the counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. The counselor must not indicate whether (s)he believes the discrimination complaint has merit. Since EEO counseling inquiries are conducted informally and do not involve sworn testimony or extensive documentation, the counselor (1) cannot make findings on the issue of discrimination, and (2) should not imply to the aggrieved person that his/her interpretation of the issues of the case constitutes an official finding of the agency on the issue of discrimination.

1. Right to Pursue the Matter Through the Formal Process.

If the matter has not been resolved to the satisfaction of the aggrieved person, the counselor must tell the aggrieved person that (s)he has the right to pursue the matter further through the formal complaint procedure. It is the aggrieved person, and not the EEO counselor, who must decide whether to file a formal complaint of discrimination.

2. Requirements of the Formal Complaint.

The counselor must inform the aggrieved person that the complaint:

- a. Must be in writing;
- b. Must be specific with regard to the matter or matters on which the aggrieved person received EEO counseling; the aggrieved person cannot expand the complaint to include additional issues or allegations on which (s)he did not receive counseling;
- c. Must be signed by complainant or complainant's attorney; and
- d. Must be filed within **15 calendar days** from the date (s)he receives the notice of the right to file. A postmark dated within the requisite 15 days will be evidence of timely filing.

3. Name(s) of Person(s) Authorized to Receive Complaints.

The counselor shall provide the aggrieved person with the names of persons authorized to receive complaints of discrimination. The counselor should tell the aggrieved person (or his/her representative) that the complaint may be mailed or personally delivered to one of the authorized persons.

4. File May Be Seen by Persons Needing Access and Any Confidentiality May Be Lost During Formal Process.

The counselor should explain that once the complaint reaches the formal stage, the complaint file, or part of it, may be shared with those who are involved and need access to it. This includes the EEO Officer, agency EEO officials, and possibly persons whom the aggrieved person has identified as being responsible for the actions which gave rise to the complaint. The identity of the aggrieved person does not remain confidential in the formal complaint process.

5. Provide the Aggrieved Person with a Notice of His/Her Right to File a Discrimination Complaint.

- a. The notice must specify that an aggrieved person has **15 calendar days**, after receipt of the notice, to file a formal complaint (including a class complaint).
- b. The notice must also advise the aggrieved person of the appropriate official with whom to file a complaint, and of complainant's duty to assure that the agency is immediately informed if complainant retains counsel or a representative.

VII. THE COUNSELOR'S REPORT

A. Time Limits.

The counselor must submit, to the office designated to accept formal complaints and to the complainant, the report of inquiry. This must be done within 15 days after notification by the EEO Officer or other appropriate officials that a formal complaint has been filed. It is essential that the counselor maintain his/her record of counseling so that this regulatory time limit is met.

B. Contents of Report.

The report must include:

1. A precise description of the issue(s) counseled and the basis(es) stated by the complainant;
2. Pertinent documents gathered during the inquiry;
3. Specific information bearing on timeliness of the counseling contact;
4. If timeliness appears to be a factor, an explanation for the delay; and
5. An indication as to whether an attempt to resolve the complaint was made.

C. Confidentiality of Negotiations for Resolution.

In order to facilitate resolution attempts, all parties involved in resolution must be free to explore all avenues of relief. Offers and statements made by parties must not be used against either party if resolution attempts fail.

The counselor will not report any discussions that occur during negotiations for resolution. All notes, drafts and other records of counseling efforts will be maintained by the EEO counselor after counseling is completed. The counselor should also retain a copy of his/her counselor's report for availability in the event that the original counselor's report, submitted to the office designated to accept formal complaints, is lost or misplaced.

Attachment D is a recommended format for a counselor's report.

VIII. COUNSELING CLASS ACTION COMPLAINTS

Occasionally, an EEO counselor may need to provide EEO counseling to a class of people.⁸ A class is defined as a group of employees, former employees, or

⁸ This need may arise in the course of counseling an individual where the counselor identifies allegations of class discrimination.

applicants who have alleged that they have been or are being adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, or handicap. See Chapter 7 for further guidance.

The aggrieved person comes to the EEO counselor as a class agent representing the group. A class inquiry must be brought to the attention of an EEO counselor by a class agent **within 45 calendar days** of the date or, if a personnel action, within **45 calendar days** from its effective date that the specific policy or practice adversely affected the class agent.

The EEO counseling requirements for class allegations follow those of individual allegations of discrimination, but the facts must be framed to meet the requirements of section 1614.204.

It is strongly recommended that, if matters concerning class allegations are raised or an individual approaches an EEO counselor as a class agent for counseling, the EEO counselor immediately contact the EEO Officer, or designated person, for advice and guidance on the proper course of action to follow.

[Attachment A]**EEO Counseling Techniques**

This attachment can be used to develop or refine counseling techniques. Below are suggested methods to follow in each step of the counseling process.

EEO counseling consists of the following steps:

- 1. Preparing for the effort**
- 2. Holding discussions**
- 3. Assessing the situation**
- 4. Determining appropriate resolution technique(s)**
- 5. Using informal resolution technique(s)**

In reviewing each step, the counselor must remember that each informal resolution situation will be different and each counselor will have his/her own style. There will probably be times when the counselor will need to make modifications to fit the situation.

A. Meeting with the Aggrieved Person

1. Initial Actions

- a. Upon contact by an aggrieved person, the counselor should record the date and set an appointment for the initial counseling session to discuss the matter. Before the initial meeting, the counselor should advise the aggrieved person of his/her right to be accompanied, advised, and represented by a representative at any stage in the complaint process, including the counseling stage.**

Also, the counselor must advise the aggrieved person that (s)he will remain anonymous during counseling unless (s)he chooses not to remain anonymous. § 1614.105(g).

- b. The counselor should begin the initial meeting with the aggrieved person by explaining the role of the counselor. The counselor should then give him/her an opportunity to explain the problem.**

The counselor should create an atmosphere which is open to good communication and dialogue.

- c. The counselor should listen attentively in order to get an understanding of the issues involved (the facts as the aggrieved person sees them and the action(s) alleged to be discriminatory). Once the aggrieved person has had the opportunity to relate the matter fully, the counselor will be in a better position to define the issue(s) and basis(es) involved, determine if the problem comes under the purview of the anti-discrimination laws, and determine if special procedures apply.**
- d. The counselor should find out if the aggrieved person tried to resolve the problem or brought the problem to the agency's attention before seeking counseling and, if so, how. Part of the problem might be that (s)he did not use the appropriate mechanisms to handle the problem prior to seeking counseling and, if properly handled, the problem may be easily resolved.**
- e. The counselor should ask the aggrieved person whether (s)he is willing or unwilling to meet with agency officials.**
- f. If the matter is to be handled under part 1614, then the counselor should provide the aggrieved person with an overview of informal counseling and the discrimination complaint process under part 1614, including required notifications and time frames, and answer any questions (s)he may have about counseling and the complaint process.**
- g. If a matter involves employment discrimination and the aggrieved person chooses to have his/her case processed by the agency, the EEO counselor must provide counseling, regardless of whether the EEO counselor believes the case has merit or not.**

2. Matters Not Involving Discrimination

After listening to and asking questions of the aggrieved person, it may become apparent that (s)he is not alleging discrimination on one or more of the bases protected by the anti-discrimination laws. For

example, a person may allege that (s)he was the target of reprisal for union activities. In the absence of facts to show that the union activities are related to participation in protected EEO activities or related to opposing discriminatory practices, the counselor can offer other alternatives for redress.

3. Matters Involving Prohibited Discrimination

When the matter involves an allegation of discrimination, the counselor should proceed with the initial counseling session and do the following:

- a. Determine whether or not special procedures apply (i.e., mixed case, negotiated grievance procedure, or age) and advise appropriately.
- b. Find out as many specifics as possible concerning the individual's reasons for believing discrimination has occurred.
- c. Ask the aggrieved person what it would take, in his/her view, to resolve the problem. For example: The aggrieved person alleges race discrimination in an agency's selection of trainees for a computer training program. The counselor should determine what (s)he will accept to resolve the problem. Suppose (s)he will accept being placed at the top of the agency's waiting list for the next available opening. The counselor may be able to resolve this matter by presenting the offer to agency officials as a first step. If the agency agrees, the counselor has avoided the need to formulate a resolution strategy.

Learning early on exactly what it is that the aggrieved person is seeking may well provide the basis for a prompt resolution and save everyone time.

- d. Make sure the aggrieved person understands that (s)he cannot be forced to agree to any proposed solutions or to reach an agreement with the agency and that (s)he may file a formal complaint.

- e. **Conclude the initial EEO counseling session by making sure that the procedural requirements of 29 C.F.R. Part 1614 have been followed and that enough information has been obtained to attempt resolution.**

B. Meeting with Agency Officials

1. **Explain the aggrieved person's allegations and summarize the reasons or facts (s)he gave for believing there has been discrimination. The aggrieved person's name can be used only if anonymity has been waived in writing.**
2. **Explain or answer any questions about EEO counseling and the Federal complaint process. Emphasize that the counselor's role is to attempt to resolve a matter. If counseling is successful and resolution is reached, then the need for a formal complaint to be filed would be avoided.**
3. **Give the agency an opportunity to present its position on the matters raised by the aggrieved person and ask agency officials to suggest ways the problem might be resolved.**
4. **Try to get a sense of the relationship between the aggrieved person and the responding agency official. Is the relationship hostile, perhaps because of past dealings? Is the agency official interested in meeting with the aggrieved person?**
5. **Make sure that both the agency and the aggrieved person understand that they cannot be forced to enter into an agreement as a result of EEO counseling.**

C. Considering Factors in Situation

The counselor's approach to a given situation will depend on several factors, including the following:

1. **Nature of the alleged discriminatory acts and characteristics of the dispute between the parties.**
2. **Relationship between the aggrieved person and the agency.**

3. Whether the counselor must gather facts beyond those provided by the aggrieved person and the agency.
4. Acceptance by the aggrieved person and the agency of various resolution techniques.
5. The counselor's willingness to participate in various resolution techniques.

D. Conducting the Inquiry

1. Focus on the Issue(s) and Basis(es)

The counselor may be required to interview witnesses and review agency records. An inquiry into an EEO matter begins when the counselor attempts to gather information following the initial meeting with the aggrieved person. Upon completion of this initial meeting with the aggrieved person, the issue(s) raised should be clearly defined and the basis(es), i.e., race, color, sex, religion, national origin, age, reprisal, and/or handicap, identified. The counselor should keep in mind that the aggrieved person is best able to assist in defining the issue(s) since (s)he is an involved party. The counselor should not conclude an initial interview with the aggrieved party without a clear understanding of the issue(s) and basis(es). The direction the inquiry will take depends upon the counselor's understanding of the issue(s) and basis(es). If the issue(s) involves a personnel action, it will be necessary to identify the action with as much specificity as possible. For example, if the aggrieved person alleges discrimination in a promotion action, the counselor must at least determine if the aggrieved person applied, was qualified, was on the list of best qualified candidates, was interviewed and whether a selection was made. This information will help to focus the inquiry so that the counselor will know what portion of the personnel action is at issue. The counselor must include dates to ensure that the matter was raised in a timely manner. For those issues that involve actions other than personnel, the data gathering approach is the same, but gathering information can be more difficult.

2. Data Gathering from Witnesses and Agency Records

- a. **Once the issue(s) and basis(es) are defined, the counselor will need to determine if it is necessary to gather information from sources other than the aggrieved person and agency representative in order to attempt resolution. Potential sources of information could include witnesses and written documentation or records.**

If the counselor determines that witness interviews are necessary, (s)he should attempt to interview witnesses who have direct knowledge of a particular situation. The counselor should limit witness interviews to those persons who can provide information that will help the counselor better understand the matter so that resolution can be attempted. Sometimes witness interviews will be the only source of information other than information obtained from the aggrieved person and the agency. Such matters would include allegations of harassment, either sexual or otherwise, or situations where the issue raised is one of inappropriate conduct or treatment based on a prohibited reason. In addition to interviewing witnesses to obtain information, it may be necessary to review agency records as part of the inquiry into the matter.

- b. **Early in the process, the counselor must determine what documents control the action taken; i.e., whether there is a written agency procedure that must be followed in certain situations. For example, if the issue involves a promotion action, the counselor should decide if it is necessary to review the applicable promotion plan and, if so, determine where the plan is maintained. The counselor may be able to obtain needed information from official personnel folders, supervisors' working files, or wherever the personnel action is maintained, such as a promotion folder. By making inquiries, the EEO counselor will soon learn where such documents are kept and who maintains the records.**

When looking at individual records, the EEO counselor should keep in mind that his/her role is to achieve informal resolution at the lowest possible level, so the number of records reviewed should be kept to a minimum. Only records of the aggrieved person and of those who allegedly received different, more favorable treatment should be examined in an effort to achieve informal resolution.

The counselor's first contact may be at the personnel office, but the counselor may determine other sources for obtaining needed documents.

For situations which EEO counselors encounter often, the following types of issues will require review of certain records:

- (1) **Promotion** - The promotion folder should include the vacancy announcement, job description, ranking/rating factors, and SF 171 or applications of at least the aggrieved person and the selectee. The counselor should notify the personnel office that an EEO inquiry was made concerning a promotion action. The counselor should request that documents relating to the promotion action, which might ordinarily be destroyed, be retained while the inquiry is pending.
- (2) **Time and Attendance** - Agency regulations/orders on time and attendance, time and attendance records of the aggrieved person and person(s) the aggrieved person is comparing himself/herself to, and how each is treated.
- (3) **Training** - Agency procedures for requesting and recommending training, any forms required, training approved and denied with reason(s).

- (4) **Appraisal/Rating** - Agency regulations/orders on system implementation and administration, elements and standards, performance requirements, rating of the aggrieved person, and ratings prepared by same rating and/or reviewing official of similarly situated employees.
- c. In reviewing documentation, the counselor should copy only documents needed in discussions which will follow the initial inquiry. Notes should be kept, but the identity of comparators should not be revealed to the aggrieved person. Review of documents should be restricted to those that relate to the issue(s) raised by the aggrieved person and are necessary in the effort to resolve the concerns informally at the lowest possible level.

EEO counseling will often involve the use of various techniques to bring about early resolution. For example, it may include:

- (1) Holding separate meetings, followed by joint meetings, and then telephone contact to work out details of an agreement;
- (2) Holding a joint meeting to set forth the facts as both sides see them, followed by separate meetings with the parties in which the various possibilities for resolution are explored; or
- (3) Conducting a conference call or separate telephone calls to the parties during which the matter is resolved. Care should be taken to protect anonymity unless waived.

E. Developing a Resolution Strategy for 30-Day Counseling Period**1. Joint Meetings (An aggrieved person must agree to a joint meeting)****a. Advantages:**

- (1) Gives the aggrieved person and the agency an opportunity to present the facts as each sees them and to clarify points of confusion or misunderstanding.**
- (2) Gives the parties an opportunity to explore directly with each other the means for resolving issues underlying the problems.**
- (3) Helps the parties establish a more constructive working relationship by getting a better understanding of each other's concerns.**
- (4) Enables the parties to "shake hands" on any agreements reached and to work together to put them in writing.**
- (5) Allows the counselor better control of the process, making sure that the parties treat each other as equals and that threats or coercion are not used.**

b. Disadvantages:

- (1) Risks a blow-up, a hardening of positions, and increased antagonism.**
- (2) May require the parties to call a recess to explore changes in position with others (e.g., counsel).**
- (3) May be difficult to schedule.**
- (4) Can be costly when the parties are in different locations.**

c. **The Counselor Should Use This Approach When:**

- (1) The parties' positions are based on different facts or different perceptions of the same facts.
- (2) The parties have not had an opportunity to talk with each other or would like a way to reopen discussions.
- (3) The counselor is confident that (s)he will be able to control the joint meeting.

2. **Separate Meetings**

a. **Advantages:**

- (1) Allows the counselor to learn more about the parties' specific concerns and priorities.
- (2) Allows the counselor to explore alternatives.
- (3) Allows the parties to ask questions they do not want to ask in front of the other party.
- (4) Prevents the possibility of intimidation.
- (5) May be easier to schedule than a joint meeting.

b. **Disadvantages:**

- (1) May lead the parties to wonder what the counselor is saying to the other side.
- (2) Unless the resolution reached through separate meetings is re-stated in a joint meeting or through a conference call, the parties do not have the opportunity to talk with each other to make sure each has the same interpretation of the agreement. It is easier for the parties to blame the counselor for any future misunderstanding about the resolution.

- (3) May put the counselor in the position of having to pass messages back and forth between parties. Misunderstanding of the messages may occur in their transmission.

c. **The Counselor Should Use This Approach When:**

- (1) The parties' hostility and antagonism can get in the way of substantive discussions.
- (2) The counselor needs a better understanding of issues and priorities to be able to control a subsequent joint meeting.
- (3) The counselor needs to help one or both parties be realistic about possible solutions.
- (4) Scheduling is a problem.
- (5) The parties do not have a current relationship.
- (6) One party is afraid to meet with the other.

3. **Telephone Communication**

a. **Advantages:**

- (1) May be easier to schedule and quicker than joint meetings.
- (2) Less costly.
- (3) For advantages of conference calls, refer to advantages of joint meetings.
- (4) For advantages of separate calls, refer to advantages of separate meetings.

b. Disadvantages:

- (1) **Impersonal communication resulting from the inability to see how the person is responding to what is said. Harder to gain the rapport needed to explore issues and alternatives.**
- (2) **For disadvantages of conference calls, refer to disadvantages of joint meetings. Note: it may be easier to hang up the telephone than leave a meeting chaired by an EEO counselor.**
- (3) **For disadvantages of separate calls, refer to disadvantages of separate meetings.**

c. The Counselor Should Use This Approach When:

- (1) **The parties are in different locales and are not logistically able to meet face to face.**
- (2) **The issues are comparatively easy to deal with, such as those based on a misunderstanding or incorrect information.**
- (3) **The counselor needs more information to determine if counseling is productive, and scheduling a meeting for this purpose is too time-consuming.**

4. Attempting Resolution

When the counselor has a good grasp of the issues involved and has decided on which EEO counseling technique to use, (s)he is ready to attempt resolution. Resolution of an EEO problem means that the aggrieved person and the agency come to terms with a problem and agree on a solution. The counselor should generally concentrate on resolving individual cases independently but, when appropriate, should ask for assistance from the EEO officer in reaching a solution or correcting a problem. When asking the EEO officer for help, the counselor should relate what (s)he has learned in the inquiry (using the

aggrieved person's name only if (s)he has given permission) and be prepared to recommend specific action.

There is no set formula for a counselor to follow in attempting a resolution using the techniques described. The counselor can attempt resolution by talking with the parties separately or together. The counselor can talk with them together only if the aggrieved person has given permission; otherwise, they must be spoken with separately.

The following subsections highlight barriers faced when attempting resolution and provide guidance on how to attempt resolution using the EEO counseling techniques of joint meetings, separate meetings, and telephone communication.

5. Barriers to Informal Resolution

In order to resolve an EEO matter, the agency and the aggrieved person must agree on a solution. However, *only the agency has the authority to resolve an EEO matter*. Like most situations involving two parties, the counselor can expect barriers to resolution of EEO matters. These barriers can be put up by both parties. The challenge is to overcome these barriers and work out a solution.

Sometimes barriers can be overcome by bringing the parties together and having them candidly discuss their attitude toward working out a solution. Other times, barriers can be lessened by helping the parties explore possible outcomes if the matter is escalated to the formal complaint level. However, the EEO counselor must recognize that not all barriers can be overcome and attempts at resolution should end when it is apparent that the parties are unable to come to an agreement.

a. Some agency barriers are listed below:

- (1) "There was no discrimination, so nothing should be done."

- (2) "The decision at issue was correctly made, procedures were correct, nothing should be done for the aggrieved person."
- (3) "Resolution will encourage frivolous complaints."
- (4) "Subordinates and supervisors will lose respect for a manager who settles rather than fights."

b. Aggrieved persons may also impose barriers to successful resolutions of problems. Such barriers may include:

- (1) "Discrimination must be punished."
- (2) "My manager must be disciplined."
- (3) "My manager must apologize"
- (4) "No remedy is sufficient."
- (5) "The agency must pay punitive damages."⁹

F. Attempting Resolution Using the Joint Meeting Technique

This subsection outlines the steps and activities involved in arranging and conducting joint meetings. The counselor should make sure the aggrieved person has consented to joint meetings with the agency before arranging a joint meeting.

1. Arranging a Joint EEO Counseling Session

- a. The counselor should select a location convenient for both parties.

⁹ Under the Civil Rights Act of 1991, punitive damages are not available against a Federal employer.

- b. The counselor should arrange a date and time convenient to both parties, but as soon as possible.**
- c. If there does not seem to be a mutually acceptable time for the parties to meet, consider the following questions:**

 - (1) Is there a suitable and feasible alternative to the joint meeting? If so, the counselor should use it.**
 - (2) Does the scheduling problem appear to be real, or does it appear to be a delaying tactic?**
 - (3) If the scheduling problem appears to be real, how do the parties feel about postponing the meeting? Would a request for an extension make resolution within 30 days impossible?**
 - (4) If the scheduling problem is more of a delaying tactic and if there is no suitable alternative to a joint meeting, the counselor should terminate counseling.**
- d. The counselor should determine who will be attending the meeting and let all parties know who will be present.**
- e. The counselor should let the parties know the way the meeting will be run and suggest ways the parties can prepare for the meeting. Each party should understand that the counselor chairs the meeting but will not take a position on the merits of either party's position or the merits of any proposed solutions made by the parties, and that the counselor will not make decisions for the parties.**
- f. The counselor should explain that the purpose of the meeting is to provide each party with an opportunity to present the facts and problems as each sees them, to clarify the issues, to establish points of agreement and disagreement, and to explore the possibility of some form of voluntary resolution acceptable to both parties.**

- g. The counselor should suggest that the parties review the facts of the case as they know them and think about what it would take to resolve the problem as they see it.**
- h. The counselor should point out the confidentiality of discussions to both parties.**
- i. If at the last minute one of the parties calls to cancel, the counselor should try to determine if the reason is legitimate. If it appears it is, the counselor should reschedule the meeting as quickly as possible. If rescheduling becomes a problem, an alternative to the joint meeting should be explored. If there is a question about the reason for cancellation or if a party cancels more than one meeting, the counselor should decide whether informal resolution efforts should be terminated.**

2. Conducting a Joint EEO Counseling Session

The counselor should:

- a. Start the meeting on time.**
- b. Make sure everyone at the table knows everyone else and the reason each person is there.**
- c. Set the tone and establish ground rules. This is the time to restate the purpose of the meeting, the EEO counselor's role, and the role and responsibility of the parties.**
- d. Work with the parties toward resolution.**
- e. Prepare to handle the unexpected.**
 - (1) If one party does not appear for the meeting, the counselor should find out why. Discuss the issues involved with the party who does appear. Try to get a sense of what it would take to resolve the matter. See if the party is interested in continuing EEO counseling and is willing to reschedule the meeting.**
 - (2) If one of the parties is about to break off discussions and**

leave in a huff, the counselor should try to calm the parties down and do the following:

- Help both parties save face by getting them to put aside emotions and address the problem.
 - Talk to the parties separately, if necessary.
 - Not dwell on the incident if discussions resume, but remind the parties that a resolution does not have to be achieved and that it is okay to agree to disagree and to end informal resolution. The counselor can explain to the parties that a decision to end informal resolution efforts should be a conscious, deliberate one, not one simply made in a moment of anger.
- f. If one of the parties accuses the counselor of bias and asks the counselor to leave, the counselor should leave provided the other party is willing to continue the meeting without the counselor. If the other party is not willing to continue, the meeting should be adjourned.
- (1) Later, if appropriate, the counselor can clarify what happened and try to regain acceptance.
 - (2) Apologize for any misconceptions that might have been created.
 - (3) Decide whether to terminate EEO counseling.

3. Ending the Joint EEO Counseling Session

A joint EEO counseling session can end in one of the following ways:

- a. With a resolution. The counselor should explain that (s)he will draw up a written agreement to be signed by both parties.

- b. **Without resolution but with an agreement to keep trying. The counselor should explain that she will arrange the next meeting. Keep in mind the requirement, pursuant to section 1614.105(d), to conduct the final interview no later than the 30th day of initial contact by the aggrieved person, unless the aggrieved person and the EEO Director (or his delegatee) agree in writing to postpone the final interview. § 1614.105(e).**
- c. **Without a resolution and with a decision to end EEO counseling. The counselor should explain to the aggrieved person that (s)he will set up a final counseling session at which time the counselor will explain the next steps.**

The counselor should make sure that each party agrees on the way the meeting is ending.

G. Attempting Resolution Using the Separate Meeting Technique

1. What Should Be Done Up Front

Separate EEO counseling sessions with each party can be used in place of or to supplement joint meetings. If separate meetings are to be used, the parties should know:

- a. **That the counselor will be meeting separately with the parties.**
- b. **The purpose of the meetings.**
- c. **That what is said in the meetings is intended to be confidential.**
- d. **That the counselor will not serve as an advisor to the parties or comment directly on the substance of a proposal.**

2. Handling Special Situations

The following paragraphs describe situations which may occur in separate meetings and suggest ways each situation might be handled.

- a. The agency concedes directly or indirectly that there may be some merit to what the aggrieved person sees as a problem.**
 - (1) The counselor can explore alternative solutions to the problem, for example, suggesting that the agency consult with appropriate officials to review the matter and merits with a view towards possible resolution. The counselor should consult with his/her EEO officer to discuss the matter before a suggestion is made to the agency to consult with legal counsel.**
 - (2) The counselor must be careful not to prejudge a case because a formal investigation may not find the situation to be as the parties described it.**
 - (3) The counselor may assist the agency and the aggrieved person in reaching an acceptable resolution of the matter.**
- b. The aggrieved person concedes directly or indirectly that there may be no merit to the allegations. (S)he thinks that there was unfair treatment, but it may not have been in violation of the anti-discrimination laws and regulations.) In such a case, the counselor can examine alternative solutions to the problem.**
- c. The parties may ask the counselor for his/her opinion regarding the strength of the allegation. The counselor should:**
 - (1) Inform the parties that (s)he cannot comment on the strength or weakness of a given situation.**
 - (2) Let the parties judge the strength and weakness of an allegation.**

H. Attempting Resolution Using Telephone Communication

The general procedures outlined for joint and separate meetings also apply to telephone conference calls and separate telephone calls to each party. However, at the start of the conversation the counselor should:

- 1. Ask if anyone else is on the line.**
- 2. Remind parties that tape recording of the conversation is prohibited.**

[Attachment B]

EEO COUNSELOR'S REPORT**29 C.F.R. Section 1614.105(c)****A) AGGRIEVED PERSON****Name:** _____**Job Title/Series/Grade:** _____**Place of Employment:** _____**Work Phone No:** _____ **Home Phone No:** _____**Home Address:** __________
_____**B) CHRONOLOGY OF EEO COUNSELING****Date of Initial Contact:** _____**Date of Initial Interview:** _____**Date of Alleged Discriminatory Event:** _____**45th Day After Event:** _____**Reason for delayed contact beyond 45 days, if applicable:**_____

_____**Date Counseling Report Requested:** _____**Date Counseling Report Submitted:** _____

C) BASIS(ES) FOR ALLEGED DISCRIMINATION

- 1) ☐ **Race (Specify)**_____
- 2) ☐ **Color (Specify)**_____
- 3) ☐ **National Origin (Specify)**_____
- 4) ☐ **Sex (Specify)**_____
- 5) ☐ **Age (Date of Birth)**_____
- 6) ☐ **Mental Handicap (Specify)**_____
- 7) ☐ **Physical Handicap (Specify)**_____
- 8) ☐ **Religion (Specify)**_____
- 9) ☐ **Reprisal (Identify earlier event and/or opposed practice, give date)**_____

D) ALLEGATIONS OF DISCRIMINATION**E) REMEDY REQUESTED****F) EEO COUNSELOR'S CHECKLIST - THE COUNSELOR ADVISED THE AGGRIEVED PERSON IN WRITING OF THE RIGHTS AND RESPONSIBILITIES CONTAINED IN THE EEO COUNSELOR CHECKLIST.****G) SUMMARY OF COUNSELOR'S INQUIRY**

- 1) **Personal Contacts**

- 2) **Documents Reviewed**

H) SUMMARY OF INFORMAL RESOLUTION ATTEMPT

**I) SUMMARY OF INFORMATION GIVEN TO AGGRIEVED
PERSON/AGENCY BY COUNSELOR**

Name of EEO Counselor

Telephone Number

Signature of Counselor

Office Address

Date

Sample Resolution Letter

Aggrieved Person's Name

Aggrieved Person's Address

RE: Resolution of EEO Matter

Dear [Aggrieved Person]:

This refers to the matter which you first discussed with me on [DATE] when you alleged discrimination because of [IDENTIFY BASIS OF DISCRIMINATION] when on [IDENTIFY DATE OF ALLEGED DISCRIMINATORY EVENT] the following occurred: [IDENTIFY ALLEGED DISCRIMINATORY EVENT]

_____. The purpose of
this letter is to set out the terms of the informal resolution.

[INSERT TERMS OF RESOLUTION]

If you believe the agency has not complied with the terms of the informal resolution, you may, under 29 C.F.R. § 1614.504, notify the Director of Equal Employment Opportunity in writing within 30 days of the date of the alleged violation, requesting that the terms of the informal agreement be specifically implemented. Alternatively, you may request that the matter be reinstated for further processing from the point processing ceased.

The agency has signed the terms of the resolution as indicated by the signature of the agency official. Your signature and date below will verify your receipt of this letter and will signify your agreement with the terms of the informal resolution of this matter as set out above. Enclosed is a duplicate copy of this letter. Please date and sign the original and the copy in the spaces provided and return the copy to me for inclusion in the counseling file. I will send a signed copy to the agency. You may keep the original.

Sincerely,

EEO Counselor Date

Agency Official Date

Aggrieved Person Date

[Attachment D]

NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

(Sample)

SUBJECT : Notice of Right To File a Discrimination Complaint

FROM : EEO Counselor DATE:

TO : (Name of Person Counseled)

This is to inform you that because the matter you brought to my attention has not been resolved to your satisfaction, you are now entitled to file a discrimination complaint based on race, color, religion, sex, national origin, physical or mental handicap, age, and/or reprisal. If you file a complaint, it must be in writing, signed, and filed, in person or by mail within 15 days after receipt of this notice, with any of the following officials authorized to receive discrimination complaints:

- **Field Installation Head
(Provide name and address)**
- **Agency Director of Equal Employment Opportunity
(Provide name and address)**
- **Agency Head
(Provide name, title, and address)**
- **Other Official(s) as designated by the Agency, for example, an agency Equal Employment Opportunity Officer, the Hispanic Program Coordinator, the Handicapped Program Coordinator, or the Federal Women's Program Coordinator
[Provide name(s) and address(es)]**

If you file your complaint with one of the officials listed above (other than the EEO officer), it will be sent to the activity EEO officer for processing. Therefore, if you choose to file your complaint with any of the other officials listed above, be sure to provide a copy of your complaint to the EEO officer to ensure prompt processing of your complaint.

The complaint must be specific and contain only those issues discussed with me. It must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit Systems Protection Board on the same matters.

If you retain an attorney or any other person to represent you, you or your representative must immediately notify the EEO officer, in writing. You and/or your representative will receive a written acknowledgement of your discrimination complaint from the appropriate agency official.

If you file a complaint, you should name _____ (The counselor should provide the name and title of the agency head or department head. Agency or department means the national organization, and not just the local office, facility or department in which the aggrieved person might work.)

**(Signature Block)
EEO Counselor**

NOTE:

A copy of this notice must be provided to the EEO officer with the EEO counselor's report and will be made a part of the complaint file.

[Attachment E]

EEO COUNSELOR CHECKLIST

At the initial counseling session, counselors must advise individuals in writing of their rights and responsibilities. At a minimum those rights include the following:

- 1. The right to anonymity in the counseling phase of the complaint process unless waived.**
- 2. The right to representation throughout the complaint process including the counseling stage.**
- 3. The possible election requirement between a negotiated grievance procedure and the EEO complaint procedure.**

Where an agency is covered by 5 U.S.C. § 7121(d)¹⁰ and where the negotiated procedure and the statute¹¹ cover the alleged discrimination, the aggrieved individual would be required to elect either 1) the statutory procedure for discrimination (the internal agency EEO process) or 2) the negotiated grievance procedure, but not both.

- 4. The election requirement in the event that the matter at issue is appealable to the Merit Systems Protection Board, i.e., the matter is a mixed case.**

The complainant has 20 calendar days from the date of the alleged discriminatory act to file a mixed case appeal with the Merit Systems Protection Board (MSPB) or 15 calendar days from the date of a counselor's notice of final interview or 30 calendar days after the initial

¹⁰ U.S. Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority are among the few agencies not covered.

¹¹ The following statutes, collectively, protect on the bases of race, color, sex, religion, national origin, handicap, and age: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; and Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a, The Equal Pay Act of 1963, 29 U.S.C. 206(d).

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EEO counselor contact to file a formal mixed case EEO complaint.¹² (S)he may not file both an MSPB appeal and an EEO complaint on the same matter. The process selected first is deemed the elected process.

- 5. The requirement that the aggrieved person file a complaint within 15 days of receipt of the counselor's notice of right to file a formal complaint in the event (s)he wishes to file a formal complaint at the conclusion of counseling.**
- 6. The right to file a notice of intent to sue when age is alleged as a basis for discrimination and of the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to section 1614.201(a).**
- 7. The right to go directly to U.S. district court on claims of sex-based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII,¹³ and in connection with the Equal Pay Act claim advise of the availability of liquidated damages for a wilful violation.**
- 8. The right to a hearing before an EEOC AJ in a non-mixed case after 180 days or after completion of the investigation, whichever comes first.**
- 9. The right to go to U.S. district court 180 days after filing a formal complaint or 180 days after filing an appeal.**
- 10. The duty to mitigate damages, e.g., that interim earnings or amounts which could be earned by the individual with reasonable diligence generally must be deducted from an award of back pay.**

¹² Time frames in this checklist and in the Management Directive are stated in calendar days, unless otherwise noted.

¹³ Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. Equal Pay Act complaints may be processed under Part 1614. In the alternative, a complainant may go directly to U.S. District Court.

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11. The duty to keep the agency and EEOC informed of current mailing address and to serve copies of the appeal papers on the agency.
12. The right to receive in writing within 30 calendar days of the first counseling contact (unless the time period is extended by complainant's prior written consent) a notice terminating counseling and informing the aggrieved of 1) the right to file a formal complaint within 15 calendar days of receipt of the notice, 2) the appropriate official with whom to file a formal complaint, and 3) the complainant's duty to immediately inform the agency if the complainant retains counsel or a representative.

Any extension of time for counseling may not exceed an additional 60 days. Where notice is not provided and no extension is secured, the complainant has the right to file a formal complaint after the 30th day. Exception: Where complainant agrees to participate in an established alternative dispute resolution program, the written notice terminating the counseling period will be issued upon completion of the dispute resolution process or within 90 days of the first contact whichever is earlier.

13. Only matters raised at the counseling stage or matters like or related to matters raised at the counseling stage, may be the subject of a formal complaint.
14. The time frames in the complaint process.
15. The class complaint procedures and the responsibilities of a class agent where class allegations are raised.